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### Structuring Redevelopment Agreements and Plans

Developers must act early to ensure their interests are protected for the life of the project

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The Local Redevelopment and Housing Law (LRHL) provides municipalities with an essential tool for revitalizing stagnated areas for the benefit of their residents. A successful redevelopment project requires a tremendous commitment of financial resources, expertise and experience. Few municipalities, however, possess the required resources. As a result, it is necessary for municipalities to designate private developers to implement

their redevelopment efforts.

Even for private developers, the commitment required to undertake a redevelopment project is substantial — not only in terms of resources but also in terms of time. In large scale redevelopment projects, full implementation may take anywhere from 10 to 15 years. Moreover, a remarkable portion of the resource commitment occurs in the early phases of the project before any realization of revenue. Consequently, the primary concern for private developers is protecting their investment from contingencies, such as changes in political climate and competing development within the area declared “in need of redevelopment” or “in need of rehabilitation” (the “redevelopment zone”).

The place to address these contingencies is, of course, in the applicable redevelopment plan and redevelopment

agreement. Because of the intricacy of redevelopment projects, redevelopment plans and redeveloper agreements are complex documents subject to extensive negotiation that cover a wide range of important issues. Unfortunately, a comprehensive discussion of these documents is beyond the limited scope of this article. However, over the past several years, there have been a number of important decisions arising out of the current revitalization efforts taking place to the waterfront in the City of Asbury Park that impact the manner in which private developers should structure redevelopment plans and redeveloper agreements.

In some cases, the municipality or private developer may already control all of the property within the subject redevelopment area. But more often, they do not and will only be able to obtain control over time. In such cases, it is imperative that the private developer negotiate provisions into the redevelopment plan and redevelopment agreement that permit the municipality and private developer to restrict competing development within the redevelopment zone. Otherwise, existing property owners may rush to obtain approval of projects that do not fit into the vision of the plan and may jeopardize its implementation. While the municipality may share in some of the concerns raised by concurrent development, it will not

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fully share the economic concerns held by the private redeveloper who, because of the tremendous resource investment required, must often economically control redevelopment of the entire area to ensure appropriate return on its investment. There are a number of mechanisms for achieving the required control. In a recent decision entitled *Jersey Urban Renewal LLC v. City of Asbury Park*, 377 N.J. Super. 232 (App. Div.) cert. denied, 185 N.J. 392 (2005), the Appellate Division upheld an important mechanism adopted by the City of Asbury Park and its designated redeveloper, Asbury Partners, LLC (Asbury Partners).

In Asbury Park, to ensure rigorous coordination of all redevelopment efforts, the redevelopment plan and the redeveloper agreement establish a protocol, which interested parties must follow to redevelop property within the waterfront redevelopment area. That protocol requires interested parties to: (1) enter into an agreement with Asbury Partners, designated the master developer, to become a "subsequent developer;" (2) obtain approval from Asbury Park to act as a subsequent developer; and (3) submit their development plan to the technical review committee and Asbury Park for comments and approval. Only after interested parties have taken these steps may they file a site plan application.

In *Jersey Urban*, an existing property owner (Jersey Urban Renewal LLC) attempted to bypass the protocol and file a site plan application directly with the City of Asbury Park Planning Board. The planning board refused to hear the application. In response, Jersey Urban filed an action in lieu of prerogative writ challenging the planning board's refusal to hear the application. Jersey Urban argued that Asbury Park, through adoption of the protocol, had impermissibly usurped the jurisdiction exclusively vested within the planning board by the municipal land use law (MLUL) and the LRHL to hear site plan applications.

The Appellate Division rejected the argument. The Appellate Division explained that the redevelopment plan

delineates standards applicable to all properties in the redevelopment zone. The LRHL specifically provides that the redevelopment plan must indicate proposed land uses for the project area and those uses "supersede applicable provisions of the development regulations of the municipality or constitute an overlay zoning district within the redevelopment area." Thus, the Appellate Division held that "the Planning Board's legislative authority to decide the site plan application had not been abridged." Rather, the Appellate Division found that the protocol simply imposed specific redevelopment criteria upon property owners, "not unlike development standards imposed" in typical zoning ordinances and thus, was valid under LRHL and MLUL.

The *Jersey Urban* decision confirms that a properly structured redevelopment plan and agreement can restrict concurrent development.

Obviously, another challenge for a private developer who does not already own all the property designated for redevelopment is the challenge of acquiring that property. One option is condemnation. Besides the obvious political obstacles existing today, condemnation presents a number of additional challenges. Those challenges arise out of the fact that the redeveloper does not have the power of condemnation. It can only request that the municipality exercise its power of eminent domain. Thus, the redeveloper must cede some level of control over property acquisition to the municipality.

The Eminent Domain Act mandates that a municipality strictly follow specific procedures in acquiring property by condemnation. Before commencing a condemnation action, the municipality must first attempt to acquire the property through arms' length negotiations. The Eminent Domain Act obligates Asbury Park to negotiate in "good faith." Failure to engage in good faith negotiations may result in loss of time and even forfeiture of acquisition rights.

If the municipality is unable to acquire the property through good faith negotiations, it may commence a con-

demnation action. In a condemnation action, the existing property owner may challenge not only the value of the property but also the authority of the municipality to take the property. The private developer implementing the redevelopment plan clearly has a substantial interest in the resolution of both those issues. After all, it is the private developer and not the acquiring municipality whose financial resources are at risk. As a result, the private developer's clear inclination would be to intervene in the condemnation proceedings. The New Jersey Appellate Division, however, recently denied Asbury Partners the right to intervene in a condemnation action entitled *City of Asbury Park v. Asbury Park Towers*, 2006 WL 2441549 (App. Div. 2006).

In *Asbury Park Towers*, Asbury Partners sought to intervene as of right or, in the alternative, by leave, based upon Rules 4:33-1 and 4:33-2. The controlling issue in the case was whether Asbury Partners possessed a unique interest that was not protected by the presence of Asbury Park in the proceedings. Asbury Partners argued that it had a unique and substantial financial interest in the outcome of the proceedings that could not be represented adequately by Asbury Park given that (a) Asbury Park had little incentive to seek the true condemnation value of particular lands since its funds were not at risk, and (b) the amount Asbury Park agreed to pay for individual properties would affect the substantial private investment made in the redevelopment project as a whole.

In rejecting that argument, the Appellate Division noted that the parties had developed a framework in their redevelopment agreement for implementing the redevelopment plan and, as a result, there was no need for both parties to share equally in all responsibilities associated with land acquisition. The Court found that Asbury Park had the same vested interest as Asbury Partners in the ultimate success of the redevelopment efforts. Most importantly perhaps,

the Appellate Division recognized that Asbury Park was under a legal obligation to “turn square corners” in its approach to the landowners and its dealings with Asbury Partners by virtue of certain protections included in the redevelopment agreement.

In light of that decision, private developers must take affirmative steps to include in redeveloper agreements specific provisions permitting the private developer to retain as much control as legally possible over the acquisition process. Some of the protections that a private developer may wish to seek include: (1) input into the selection of the appraiser; (2) input into the selection of the law firm who will prosecute the condemnation proceedings; (3) the right to engage in negotiations to acquire property before initiation of the condemnation process; (4) the right to request initiation of condemnation proceedings; and (5) the right to monitor condemnation proceedings.

The time required to implement a

redevelopment plan raises concerns about potential changes in the political climate within the municipality. Changes in the political climate may result when the members of the town council who supported the redevelopment plan are replaced by persons with divergent opinions. Private developers must negotiate provisions to insulate themselves from that possibility.

One protection sought by all private developers is vested rights. The MLUL provides for the vesting of rights upon approval of site plan applications and general development plan applications. Depending upon the size of the redevelopment zone, a private developer may wish to incorporate a general development plan (N.J.S.A. 40:55D-45.1 et seq.) or elements of a general development plan into the redevelopment plan. The private developer should also seek to include provisions providing vested rights in the redevelopment plan, redevelopment agreement and supporting ordinances.

Default provisions represent another form of essential protection. Private developers should negotiate stringent default provisions. Those provisions should vigilantly define the conditions of default. They should further include a carefully coordinated dispute resolution provision that at a minimum contains “fast track arbitration” and consent to injunctive relief clauses.

Today, the vast majority of large-scale redevelopment projects are the result of public-private collaborations. Given that these projects take place over long periods of time and require vast resources expended principally by the private developer, it is important at the very earliest stages of the process for private developers to take the actions necessary to ensure their interest and investment will be protected over the life of the project. A well-crafted redevelopment plan and redevelopment agreement represent the strongest means of doing so. ■